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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
Petitioner

vs.

WALTER J. HICKEL, Secretary of Interior, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Citations to Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement 3

Reasons for Granting the Writ:

I. The Refusal of the Lower Courts to Convene a Three-Judge District Court Violates 28 U.S.C. § 2282 and Controlling Decisions of This Court 5

II. A Definition of the Limits of Federal Authority over State-Owned Resident Wildlife Is Required by the Federal Ownership of One-Third of the Land in the United States 7

III. The Court of Appeals Has Misconstrued This Court's Decision in *Hunt* v. *United States* 10

IV. The Court of Appeals Erroneously Ignored Applicable Rules of Statutory Construction and Pertinent Legislative History 18

Conclusion 23

Appendix A—Statutes A1

Appendix B—Opinions Below:

Opinion of United States District Court for the District of New Mexico A6

Opinion of the United States Court of Appeals for the Tenth Circuit A13

Table of Authorities

CASES

Alabama v. *Texas*, 347 U.S. 272, 74 S. Ct. 481, 98 L. Ed. 689 (1954) 16

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954) 7

Allen-Bradley Local No. 1111 v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942) 16

California v. *Zook*, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949) 21

Flast v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) 7

Florida Lime & Avocado Growers, Inc. v. *Jacobsen*, 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960) 7

Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) 21

Geer v. *Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896) 11

Head v. *New Mexico Board of Examiners*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963) 16

Hunt v. *United States*, 278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928), *modifying*, 19 F.2d 634 (D. Ariz. 1927) 6, 10, 11, 12, 13, 14, 15, 17, 19

Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) 21

International Association of Machinists v. *Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961) 21

Interstate Commerce Commission v. *Northern P. Ry. Co.*, 216 U.S. 538, 30 S. Ct. 417, 54 L. Ed 608 (1910) 20

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) 6

Lacoste v. *Department of Conservation*, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924) 11

Larson v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) 11

Lee v. *Bickell*, 292 U.S. 415, 51 S. Ct. 727, 78 L. Ed. 1337 (1934) 7

Lynch v. *Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962) 20, 21

Malone v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962) 10-11

Marshall v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962) 6

Metlakatla Indian Community v. *Egan*, 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962) 11

New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *rev'g*, 281 F. Supp. 627 (D.N.M. 1968) 2

Kiss & Co. v. *Hoch*, 99 F.2d 553 (10th Cir. 1938) 6

San Diego Building Trades v. *Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959) 21

Shapiro v. *United States*, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948) 20

Sterling v. *Constantin*, 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932) 7

The Borden Company v. *Liddy*, 309 F.2d 871 (8th Cir. 1962) 6

Triangle Conduit & Cable Co., Inc. v. *Federal Trade Commission*, 168 F.2d 175 (7th Cir. 1948), *aff'd*, 336 U.S. 956, 69 S. Ct. 883, 93 L. Ed. 1110 (1949) 13

Udall v. *Tallman*, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) 18

Zemel v. *Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) 7

STATUTES

U.S. Const. Art. IV, § 3, cl. 2 ..... 3, 15

U.S. Const. Amend. X 3, 15

7 U.S.C. § 426 8

16 U.S.C. §§ 1, 2-4 ..... 2, 3, 4, 10, 11, 15, 17, 18, 20, 21, 22

16 U.S.C. § 3 18

16 U.S.C. § 407(a) 8

16 U.S.C. § 664 20
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 3
28 U.S.C. § 2201 3
28 U.S.C. § 2282 ..... 2, 4, 5, 6
28 U.S.C. § 2284 ..... 4, 6
N.M. Stat. Ann. § 53-2-7 (Repl. 1962) 3, 7
N.M. Stat. Ann. § 53-3-23 (Repl. 1962) 3, 17
N.M. Stat. Ann. § 53-3-25 (Repl. 1962) 3, 17

OTHER AUTHORITIES

36 Ops. Atty. Gen'l 527 (1932) 19
53 Cong. Rec. 10362-65, 12150-52, 12632, 13004-05 (1916) 22
58 Department of Interior Opinions 331 (1943) 19
Hearings on H.R. 104 Before the House Committee on Public Lands, 63rd Cong., 2nd Sess. (1914) 22
Hearings on H.R. 434 and H.R. 8668 Before the House Committee on Public Lands, 64th Cong., Ist Sess. (1916) 22
Hearings on S. 3463 Before the Senate Committee on Public Lands, 62nd Cong., 2nd Sess. (1912) 22
H. Rep. No. 700, 64th Cong., 1st Sess. (1916) 22
S. Rep. No. 380, 88th Cong., 1st Sess. 7 (1963) 19
S. Rep. No. 662, 64th Cong., 1st Sess. (1916) 22
S. Rep. No. 676, 62nd Cong., 2nd Sess. (1912) 22
U.S. Bureau of Census, Statistical Abstract of the United States: 1968 (89th Ed.) 6
3 Sutherland, *Statutory Construction* § 6201 (3rd Ed. 1943) 20

IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The New Mexico State Game Commission prays that a Writ of Certiorari issue to review the judgment of the

United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 15, 1969.[1]

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico, printed in Appendix B hereto, *infra*, p. A6, is reported in 281 F. Supp. 627. The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix B hereto, *infra*, A13, is reported in 410 F.2d 1197.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on May 15, 1969. Rehearing was denied on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

(1) Is this case properly one for a three-judge district court under 28 U.S.C. §2282?

(2) Do 16 U.S.C. §§1, 2-4 permit the Secretary of Interior and his agents to kill state-owned resident wildlife contrary to state law on federal land not exclusively owned by the United States for purposes of a scientific

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1. The case was originally brought in the United States District Court for the District of New Mexico against the Honorable Stewart L. Udall, Secretary of Interior; by order of the Court of Appeals entered on March 10, 1969, the Honorable Walter J. Hickel, Secretary of Interior, was substituted as a party in lieu of Mr. Udall.

Other parties respondent include: STANLEY A. CAIN, Assistant Secretary of the Interior; GEORGE HARTZOG, JR., Director of National Park Service; NEAL G. GUSE, Superintendent of Carlsbad Caverns National Park; R. R. MABERY, Chief Ranger; and ROBERT J. SCHUMERTH, NEAL R. BULLINGTON, WILLIAM J. WILSON, ROBERT M. TURNER, WALTER B. O'NEAL, WALTER H. KITTAM, DERRICK C. COOKE, Park Rangers.

study when there is no present or threatened depredation to the land.

(3) If 16 U.S.C. §§1, 2-4 do permit the Secretary to kill resident wildlife, do these statutes violate the Tenth Amendment to the United States Constitution?

STATUTES INVOLVED

The statutory provisions involved are Art. IV, Sec. 3, Cl. 2 and the Tenth Amendment of the United States Constitution; 39 Stat. 535, as amended, 16 U.S.C. §§1, 2-4; and N.M. Stat. Ann., §§ 53-2-7, 53-3-23, 53-3-25 (Repl. 1962). They are printed in Appendix A, *infra*, pp. A1 to A5.

STATEMENT

A complaint seeking declaratory and injunctive relief from allegedly illegal and unconstitutional actions of the Secretary of Interior and his agents [hereinafter "Secretary"] in killing deer owned by the State of New Mexico at Carlsbad Caverns National Park which is located in New Mexico was filed by the New Mexico State Game Commission [hereinafter "State"] on December 18, 1967. (R. 10-17). The jurisdiction of the District Court was invoked because the case arose under the Constitution and laws of the United States and the matter in actual controversy exceeded the sum or value of Ten Thousand Dollars ($10,000). 28 U.S.C. §§ 1331, 2201-02. Issue was joined by the filing of a stipulation between counsel concerning the facts and questions presented by the lawsuit. (R. 69-71).

The Complaint sought to enjoin the Secretary's killing of deer owned by the State of New Mexico on the *dual* grounds that no federal statute gave the Secretary authority for his actions *and* if a federal statute did give him the requisite authority, such was unconstitutional be-

cause it violated the Tenth Amendment to the United States Constitution.

The trial court was apprised of the constitutional questions but, because it believed that no federal statute permitted the Secretary to kill deer owned by the State of New Mexico at Carlsbad Caverns contrary to New Mexico law, decided that it need not convene a three-judge district court under 28 U.S.C. §§ 2282, 2284, to consider the substantial and unanswered constitutional questions presented by the Complaint, the State's Response to Defendants' Motion for Summary Judgment, and Stipulation. (Appendix B, *infra*, p. A6; R. 12, 63-64, 71). On April 1, 1968, in accordance with its findings of fact and conclusions of law set forth in its opinion, the trial court granted a declaratory judgment in favor of the State that the Secretary had no authority under any United States statute to kill deer at Carlsbad Caverns National Park in pursuing the study involved in this case. The trial court also permanently enjoined the Secretary and his agents from killing said deer without authority from the State of New Mexico. (Appendix B, *infra*, p. A13).

The United States Court of Appeals reversed the trial court on May 15, 1969, and held that the Secretary had authority under 16 U.S.C. §§ 1, 2-4, to kill State-owned deer at Carlsbad Caverns for research purposes. (Appendix B, *infra*, pp. A19 to A20). The State filed a "Petition for Remand to Three-Judge District Court and/or Petition for Rehearing" on May 29, 1969 (R., Court of Appeals 6), which was denied by the Tenth Circuit, without opinion, on June 13, 1969. (R., Court of Appeals 8).

An "Application for Three-Judge District Court Under 28 U.S.C. § 2282" was filed in the United States District Court for the District of New Mexico on July 7, 1969. This Application was denied on July 17, 1969, because the trial

court believed it no longer had jurisdiction to initiate the procedure for the convening of a three-judge district court. (Supplementary Record in District Court).

REASONS FOR GRANTING THE WRIT

I.

The Refusal of the Lower Courts to Convene a Three-Judge District Court Violates 28 U.S.C. § 2282 and Controlling Decisions of This Court.

Concurrently with the filing of this petition for certiorari, the State has filed in this Court a "Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus." Even though substantial grounds exist for this Court to consider the decision of the Court of Appeals on the merits, as can be more fully seen from the subsequent discussion in this petition for certiorari, the State urges this Court first to consider the petition for mandamus, which under 28 U.S.C. § 2282, and controlling decisions of this Court, will be dispositive of this case if the petition for a writ of mandamus is granted. If mandamus is granted, this Court need not consider this petition for certiorari; the argument under this point is made only in the exercise of conservative appellate practice to bring the issue of the necessity of a three-judge district court before this Court and seek a review of the fundamental procedural and jurisdictional question through an exercise of this Court's power of supervision of the lower federal courts.

The present controversy between the State and the Secretary presents substantial and unanswered constitutional questions about the authority of the Secretary to kill resident wildlife contrary to state law. The district court expressly said it would not consider the constitutional question because it found no statutory authorization in the Secretary to conduct the study involved in

this lawsuit. (Appendix B, *infra*, p. A8). It is difficult to determine whether the Court of Appeals thoroughly considered the constitutional questions raised by the State throughout this litigation. The opinion of the Court of Appeals states only:

> "Nor are there any constitutional barriers to the procedure. *Hunt* v. *Arizona, supra.*" [Appendix B, *infra*, p. A19.]

Even if the Court of Appeals did consider the constitutional questions involved in this case, it was without jurisdiction to do so, as the case is properly one for a three-judge district court. The Court of Appeals has refused to remand the case to the district court with an order to convene a three-judge district court (R., Court of Appeals 8); the district court has also refused to initiate the procedure for the convening of a three-judge district court. (Appendix B, *infra*, p. A8; R. 137-38; Supplementary Record in District Court).

28 U.S.C. § 2282 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2282 is jurisdictional. See, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See also, *The Borden Company* v. *Liddy*, 309 F.2d 871 (8th Cir. 1962); *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962); *Riss & Co.* v. *Hoch*, 99 F.2d 553 (10th Cir. 1938). Where an injunction restraining the enforcement, operation or execution of an Act of Congress is sought on both constitutional and non-constitutional

grounds, a three-judge district court must be convened. *Flast* v. *Cohen*, 392 U.S. 83, 90, 88 S. Ct. 1942, 1947, 20 L. Ed. 2d 947 (1968); *Zemel* v. *Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80, 80 S. Ct. 568, 573, 4 L. Ed. 2d 568 (1960); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954); *Lee* v. *Bickell*, 292 U.S. 415, 51 S. Ct. 727, 78 L. Ed. 1337 (1934); *Sterling* v. *Constantin*, 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932).

Petitioner respectfully submits that both the Court of Appeals and the District Court erred in refusing to convene a three-judge district court. Because this case is properly cognizable only by a three-judge district court, both lower courts have been without jurisdiction. Such fundamental error can be cured by this Court's remanding the case to the lower courts with instructions to initiate the convening of the requisite three-judge tribunal.

II.

A Definition of the Limits of Federal Authority over State-Owned Resident Wildlife Is Required by the Federal Ownership of One-Third of the Land in the United States.

This suit was brought by the State to enjoin the Secretary from killing the deer in Carlsbad Caverns National Park pursuant to a scientific study and in contravention of state law. See N.M. Stat. Ann. § 53-2-7 (Repl. 1962). The study contemplated the killing of fifty (50) deer, fifteen (15) of which were actually killed before the Secretary was enjoined. Carlsbad Caverns National Park is situated within the boundaries of the State of New Mexico. Although the land is owned by the United States Government, New Mexico has never ceded exclusive jurisdiction over Park lands to the United States. The Park

is administered under the direction of the Secretary of Interior by the National Park Service. 46 Stat. 279, 16 U.S.C., § 407 (a). The narrow issue presented by the immediate facts of this case is the Secretary's authority to kill deer at Carlsbad Caverns National Park for a scientific study in contravention of New Mexico law. However, the determination of the narrow issue has implications and significance to the entire Nation which greatly transcend the facts of the present controversy.

The Court is respectfully requested to review this case because of the great national consequences inherent in the issues presented. Over one-third of the total area of the United States—that is, in excess of 760 million acres—is owned by the United States Government. U.S. Bureau of Census, *Statistical Abstract of the United States: 1968*, at 194 (89th Ed.). Major portions of many Western States are owned by the United States.[2] *Ibid.* Over 503 million acres of all lands owned by the United States are used by the Department of Interior and the Department of Agriculture for forest and wildlife purposes. *Id.*, at 196.

Even though the decision of the Court of Appeals concerns only the actions of the Secretary of Interior at Carlsbad Caverns National Park, the decision is substantial authority for both the Department of Agriculture and the Department of Interior to kill, without restriction, state-owned resident wildlife on any federal lands contrary to state law. (See 46 Stat. 1468, 7 U.S.C. § 426, concerning the authority of the Secretary of Agriculture to destroy injurious animals.) Since the greatest bulk of the land owned by the United States consists of lands used for forests and wild-

2. Alaska (96.9%); Arizona (44.8%); California (44.3%); Colorado (36.4%); Idaho (64.2%); Montana (29.7%); Nevada (86.4%); New Mexico (34.1%); Oregon (52.2%); Utah (66.6%); Washington (29.4%); and Wyoming (47.0%).

life, the decision reaches much further than fifty deer owned by the State of New Mexico. The decision reaches virtually every species of resident wildlife in the United States because most of such wildlife is indigenous to the forest.

The great concern of the several states with the issue in this case is evidenced by the number of Attorneys General who have deemed it necessary to join the State of New Mexico in petitioning this Court to review the decision of the United States Court of Appeals for the Tenth Circuit. Thirty-five states have joined with the State of New Mexico in this petition; one national and one international association dedicated to the conservation of wildlife have also joined with the State of New Mexico in its efforts to prohibit the Secretary's unwarranted invasion of the game management programs of the several states. (*Infra*, p. 23 *et seq.*)

Just as states are precluded from interfering with interstate commerce because uniform regulation thereof is necessary for its unfettered existence, so too should this Court prohibit the United States from interfering with the historical and traditional role of the states in game management. If the United States is permitted to manage game under the guise of a scientific study, the vast game management programs of the several states must necessarily fail because such programs obviously cannot be successful when one entity (United States) seeks to destroy the same species at the same time that another entity (several states) seeks to protect and preserve the same species. Yet, this is the situation present here—the Secretary seeks unlimited authority to destroy resident wildlife without complying with applicable state law. Thus, the significance of this case to all the states (especially to the Western States) arises from the many millions of acres owned

by the United States and makes this a most appropriate and important case for this Court to review if it is not to be remanded to a three-judge district court pursuant to the state's petition for mandamus concurrently filed herewith.

III.

The Court of Appeals Has Misconstrued This Court's Decision in Hunt v. United States.

The decision of the Court of Appeals can be summarized in four points:

1. Resident wildlife within a state is owned by the state.

2. The killing of New Mexico deer pursuant to the Secretary's study was within the Secretary's authority under 16 U.S.C. §§ 1, 2-4.

3. "Nor are there any constitutional barriers to the procedure. *Hunt* v. *Arizona, supra.*" (278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928), *modifying,* 19 F.2d 634 (D. Ariz. 1927).)

4. Therefore, this suit was barred by the doctrine of sovereign immunity.

If the Secretary had authority under federal law to conduct the study and if it were within the power of Congress to authorize such a study, the holding of the Court of Appeals that this suit is barred by the doctrine of sovereign immunity is correct. If, however, the Secretary had no authority or if the Congress had no power under the Constitution to grant authority to the Secretary to destroy State-owned property for research purposes, the doctrine of sovereign immunity is not a bar to this suit. *E.g., Malone* v. *Bowdoin,* 369 U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d

168 (1962); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 702, 69 S. Ct. 1457, 1467, 93 L. Ed. 1628 (1949).

To determine whether federal law gave the Secretary authority for his study, whether such federal statutes are constitutional, and whether this suit is barred by the doctrine of sovereign immunity, one must begin with the long-standing doctrine that resident wildlife is owned by the states (*Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 57, 82 S. Ct. 552, 560, 7 L. Ed. 2d 562 (1962); *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549, 44 S. Ct. 186, 187, 68 L. Ed. 437 (1924); *Geer* v. *Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896)), and then determine the underlying purpose of the Secretary's study. If the purpose of the study were to prevent present depredation to federal lands, the State concedes that the Secretary had statutory authority to kill the deer involved in this case and such statutory authority is constitutional. *Hunt* v. *United States, supra.* The trial court found, however, that there was no present depredation to federal lands—a fact admitted by the Secretary in the trial court. (Appendix B, *infra*, p. A7).

Furthermore, even though no case so holds, it would seem to be a supportable conclusion that federal law permits the Secretary to kill resident wildlife upon a clear showing of an imminent threat of depredation to federal lands. Again, the State concedes that there would be no constitutional barriers to such a construction of 16 U.S.C. §§ 1, 2-4. Such a conclusion would not be a major departure from the holding of this Court in *Hunt* v. *United States, supra.* But, a reading of the trial court's decision in this case and the stipulation of facts (Appendix B, *infra*, p. A7; R. 69-71) reveals no evidence nor any finding of fact by the trial court that there was an imminent threat

of depredation to Carlsbad Caverns National Park. Finally, it is most important to note that nowhere in the record of this case has the Secretary contended that his study was necessary to prevent the threat of imminent depredation.

If there were no actual depredation and if there were no imminent threat of depredation to Carlsbad Caverns National Park, one could only conclude that the purpose of the study was for the collection of pure scientific information. A reading of the study supports this (R. 41, 43, 55); the stipulation of counsel supports this (R. 69-71); and the trial court so found:

> "The Court was informed that the Government did not intend to kill the deer because of a present knowledge of depredation, but merely to gather information as the basis for a study." [Appendix B, *infra*, p. A7.]

This finding of fact was not challenged by the Secretary in his appeal of this case to the Tenth Circuit; but even if the Secretary had contended that the scientific study were necessary to prevent even an imminent threat of depredation, a proposition which the record does not support, there was no showing by the Secretary that the killing of deer in contravention of New Mexico law was the only feasible method for acquiring such information.

Yet, a reading of the Tenth Circuit's decision in this case indicates that the Court of Appeals set aside the trial court's finding on the purpose of the study and supplied a finding of fact to bring the present case under the principles announced by this Court in *Hunt* v. *United States, supra*. The Court of Appeals, contrary to the finding of fact made by the trial court, indicates that the study was necessary "to obtain reliable scientific information necessary to conserve the scenery and wildlife in the Park." (Appendix B, *infra*, p. A15). Furthermore, the Court of Appeals said:

> "He [Secretary] need not wait until the damage through over-browsing has taken its toll on the Park plant life and deer herd before taking preventive action, no less than he would be required to delay the destruction of a vicious animal until after an attack upon a person." [Appendix B, *infra,* p. A18.]

It is axiomatic that a district court's findings of fact are not to be set aside on appeal unless "clearly erroneous." Rule 52 (a), Federal Rules of Civil Procedure. See also *Triangle Conduit & Cable Co., Inc.* v. *Federal Trade Commission*, 168 F.2d 175, 179 (7th Cir. 1948), *aff'd*, 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949), where the Court said:

> "Findings of the trial court 'are to be construed liberally in support of a judgment or order. . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.' "

And yet, the finding of Court of Appeals that there was a threat of depredation, a conclusion which is necessitated by its analogy to the destruction of a vicious animal, was made. That is, one would not know that an animal was vicious unless such animal had previously made some showing thereof. However, as pointed out above, there is no evidence in the record of this case that there was a threat of imminent depredation to federal lands, nor was such a contention made or such a finding requested, nor was there a showing that the information sought by the United States could not be obtained in ways other than the destruction of State-owned resident wildlife.

In finding that the Secretary had authority to kill the deer, the Court of Appeals analogized the present case to *Hunt* v. *United States, supra,* and also found that the United States Constitution did not preclude such authority in the Secretary. If a cursory look at the facts in *Hunt* is taken,

it is evident that *Hunt* is no authority for the Secretary's actions in this case.

In *Hunt*, the deer population at the Kaibab National Forest in a three-year period had increased from 3,000 to 30,000. Food for the deer was so insufficient that many were dying; those deer which survived were causing great injury to the federal land upon which they browsed. There was no question that the deer population had to be reduced. Various methods were attempted to reduce the population, such as trapping and shipping the deer to another site, but all such methods failed. The Secretary of Agriculture then authorized a hunt to reduce the deer population, but the Arizona officials objected, interfered therewith, and threatened to arrest and prosecute any violators of the very restrictive state game laws. See *Hunt* v. *United States*, 278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928), *modifying*, 19 F.2d 634 (D. Ariz. 1927).

Facts in the present case are so substantially different from those in *Hunt* that it is no authority whatsoever for the actions of the Secretary of Interior here. There is no present depredation in this case nor is there any threatened depredation. No efforts to collect the scientific information desired by the United States have been made other than the killing of deer nor is it shown by the record that other methods for collecting the scientific information would be unfeasible. The State has not refused to cooperate with the United States but rather, the record clearly indicates that the State has offered the requisite scientific collection permits to the United States agents. (R. 70). State law is not restrictive like it was in Arizona but rather State law sets forth a procedure by which the scientific information desired can be collected. These, and other facts, reveal the great disparity between the facts of the present case and those of *Hunt*.

Yet, the Court of Appeals has said that *Hunt* is authority for the proposition that there are no constitutional barriers to permitting the Secretary, under 16 U.S.C. §§ 1, 2-4, to kill State-owned deer for purely scientific purposes.

The State of New Mexico respectfully submits that where there is no present depredation and no threat of depredation to federal lands, there are serious constitutional barriers which preclude the Secretary from killing state-owned deer in contravention of state law.

From the very beginning of this litigation the State has contended that, even if 16 U.S.C. §§ 1, 2-4 do give the Secretary authority to kill the deer in this case, such statutes are contrary to the Tenth Amendment to the United States Constitution. The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

No provision of the United States Constitution denies the power of game management to the states. The only power set forth in the United States Constitution which might permit the United States to kill resident wildlife, and the power relied upon by the Secretary in this case, is Article IV, § 3, Clause 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

The very language of the United States Constitution shows that the above constitutional provision is no authority for

the Secretary's actions. Under the above constitutional provision, Congress has been given the power only to make rules and regulations for property "belonging" to the United States. When Congress is promulgating legislation concerning land or property owned by the United States, it is true that it has virtually absolute power without limitations. Such absolute power extends over *lands* belonging to the United States; it does not, nor was it ever intended to, extend over resident species of *wildlife*. The above power does not extend over deer belonging to the State of New Mexico. Furthermore, it should be noted that this Court has said that Congress may deal with Federal property "precisely as an ordinary individual may deal with farming property." *Alabama* v. *Texas*, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954). Under New Mexico law, a private landowner would need a permit to kill deer under circumstances similar to those in this case. Unless there was depredation to the lands of the United States or a serious threat of depredation, the above power confers no authority because, under such circumstances, property of the United States is not involved. As explained above, the facts of this case clearly indicate that there was no present depredation nor threat of imminent depredation.

Furthermore, it is a long-standing principle of constitutional law that a state statute otherwise valid must be upheld unless there is found a very clear and actual conflict between the state and federal regulations so that they cannot stand in the same area, or unless there is found clear evidence of a Congressional design to preempt the field. *E.g., Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942). Section

53-3-25, New Mexico Statutes Annotated (Repl. 1962), provides that the State:

> "... may grant permits to owners or lessees of land for the capture or destruction on their lands of any protected game doing damage to their ... property. ..."

Furthermore, § 53-3-23, New Mexico Statutes Annotated (Repl. 1962), provides:

> "The state director may issue permits to any person to ... kill ... game ... at any time when satisfied that such person desires the same exclusively ... for scientific ... purposes."

Thus, New Mexico law provides a remedy where wildlife is damaging property and also provides a remedy where one desires to collect resident wildlife for scientific purposes. The permits under the above statutes were offered to the officials at Carlsbad Caverns National Park and were summarily refused by them. (R. 70). A comparison of the above statutes with 16 U.S.C. §§ 1, 2-4 shows no actual conflict; the tender of the permits emphasizes that there is no conflict; and the trial court so found. (Appendix B, *infra*, p. A12). Furthermore, the federal statutes exhibit no intent of Congress to preempt the field of game management—a field traditionally occupied in whole by the states because of their ownership of resident wildlife. Without the requisite conflict or attempt to preempt by Congress, the state statutes must be followed.

It is respectfully submitted that for the above reasons the Tenth Circuit has misconstrued this Court's decision in *Hunt* v. *United States* in permitting the Secretary's unauthorized and unconstitutional invasion of the time-honored field of game management by the several States. *Hunt* v. *United States* is no authority whatsoever for permitting the Secretary to kill resident wildlife for purely scientific reasons.

IV.

The Court of Appeals Erroneously Ignored Applicable Rules of Statutory Construction and Pertinent Legislative History.

In the course of the appeal of this case to the Tenth Circuit, the State and *amicus curiae* argued that numerous rules of statutory construction preclude the Secretary's contention for an unlimited interpretation of 16 U.S.C. §§ 1, 2-4. None of these rules was mentioned by the Court of Appeals in its decision in this case. (*Infra*, Appendix B, pp. A13 to A20). The most important of these rules of statutory construction is that the long-continued contemporaneous and practical interpretation of the statute by the executive officers charged with its administration and enforcement is an invaluable aid in determining the meaning of a doubtful statute. *E.g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965), and cases cited therein. The interpretation of the agency should prevail if it is reasonable and the language of the statute will support such a construction. Since 16 U.S.C. § 3 permits the Secretary to "provide in his discretion for the destruction of such animals . . . as may be detrimental to the use of any of said parks," and the question is whether there must be a showing of present depredation, threat of imminent depredation, or no showing of any kind necessary because of unlimited discretion in the Secretary, the interpretation placed on the statute throughout the years by the Department of Interior is highly pertinent to this case. As early as 1917 the Director of the National Park Service categorized the powers delegated under 16 U.S.C. §§ 1, 2-4, as follows:

> "The organic act then goes on to authorize the promulgation of rules and regulations for the use and management of the parks and monuments and prescribes the penalties that may be imposed for the vio-

> lation of such rules and regulations. Provision is made, too, for the leasing of park lands and the granting of permits for the use of these lands for the accommodation and entertainment of visitors. The *unusual conditions* under which timber may be cut, *under which animals may be killed,* plants destroyed, etc., and under which grazing of livestock may be permitted *are also included in the law.*" [Emphasis added.] [Annual Report of the Director of the National Park Service to the Secretary of the Interior for the Fiscal Year Ended June 30, 1917, p. 2.]

See also, 58 Dept. of Interior Opinions 331 (1943), where the Solicitor General for the Department of Interior said the following concerning regulation of hunting and fishing on Wind River Reservation in Wyoming:

> "There is no doubt, however, that the State can enforce its conservation laws on public lands. The Federal Government, to be sure, if necessary to protect its interests in such lands, may disregard State conservation laws, but in the absence of an overriding federal interest, they remain applicable."

The Solicitor also said:

> "Although it has been held that, under authority conferred by statute, federal administrative officers could proceed to exterminate deer committing depredations in a national forest despite inhibitions of State conversation laws, it is implicit in this decision that the State conservation laws would normally have governed (*Hunt* v. *United States,* 278 U.S. 96)."

See also, 36 Ops. Atty. Gen'l 527 (1932); S. Rep. No. 380, 88th Cong., 1st Sess. 7 (1963). The record in this case contains uncontradicted evidence that federal officers, prior to the action which precipitated this lawsuit, had on numerous occasions sought the requisite collection permits from the State of New Mexico in pursuing their scientific studies. (R. 73-85). In fact, as mentioned above,

permits were offered to the Secretary's agents for the purpose of conducting the study upon which this lawsuit is based. (R. 70).

Since a long line of case law makes it clear that the several states own resident wildlife (*supra*, at 10-11) two other important rules of statutory construction require that 16 U.S.C. §§ 1, 2-4 be construed strictly. Because the statute is relied upon by the Secretary to interfere with established or traditional property rights, the statute should be construed strictly. See *Interstate Commerce Commission* v. *Northern P. Ry. Co.*, 216 U.S. 538, 30 S. Ct. 417, 54 L. Ed. 608 (1910). Furthermore, the statute is in derogation of the common law and should be strictly construed as to the conditions upon which the United States can kill resident wildlife owned by the several states. 3 Sutherland, *Statutory Construction*, § 6201, at 164-66 (3rd Ed. 1943).

Also pertinent to an interpretation of the statute involved in this case is the rule that, absent an indication to the contrary, it may be presumed that Congress was aware of the numerous court decisions setting forth the states' ownership of resident species of wildlife and acted with such decisions in mind. See *Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962); *Shapiro* v. *United States*, 335 U.S. 1, 16, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948). Congress has abided by these numerous court decisions in other legislation. For example, in 48 Stat. 402 as amended, 16 U.S.C. § 664, a part of the Fish and Wildlife Coordination Act, the Secretary of Interior is prohibited from adopting rules or regulations "inconsistent with the laws for the protection of fish and game of the States in which such area [under the Act] is situated. . . ." Furthermore, where courts are asked to hold that state regulation of private interests should yield to

regulation by the federal government in situations involving exercise by the state of historic powers over traditionally local matters, this Court has repeatedly held that federal law does not preempt state law unless there is a clear and manifest purpose of Congress exhibited. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-47, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960); *San Diego Building Trades* v. *Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *California* v. *Zook*, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949).

Finally, a long-standing rule of statutory construction adopted by this Court is that statutes should be interpreted as fairly as possible, in such a way as to free the statute from not insubstantial constitutional doubts. *Lynch* v. *Overholser, supra*; *International Association of Machinists* v. *Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961). If the statute involved in this case is interpreted to permit the Secretary's actions only upon the showing of present depredation or imminent threat of depredation, the serious constitutional questions posed above by the broad interpretation giving the Secretary unlimited authority would be obviated.

Neither did the Court of Appeals consider the important and relevant legislative history of 16 U.S.C. §§ 1, 2-4. Efforts to establish a National Park Service began in the 62nd Congress, continued in the 63rd Congress and culminated in approval of Public Law 235 in the 64th Congress. In no place in three separate hearings, in Senate and House reports, or in the debate leading up to enactment of the National Park Service is there any suggestion that the broad authority now claimed by the Secretary was either sought by the Department of Interior or intended

to be granted by Congress.[3] Indeed, the relevant legislative history which does exist suggests that Congress considered the authority to destroy animals that may be detrimental to the use of the park as authority only to act in exceptional circumstances.

The House versions of the bill to establish a National Park Service (Nos. 434 and 8668, 64th Cong., 1st Sess. (1916)) contained very general regulatory authority over the parks *and game* for the Secretary of Interior. The substitute measure recommended by the House Committee (H.R. 15522) granted general regulatory authority over the use and management of the parks to the Secretary but deleted the general regulatory authority over game and added a section authorizing the destruction of such animals as may be detrimental to the parks. Both provisions were later enacted and remain unchanged to this day. Even though the reasons for the House Committee's action were not discussed, its separate treatment of the Secretary's authority over wildlife confirms that the use of authority is not part of the Secretary's general regulatory authority over the parks but is instead a special authority granted by Congress for exercise in special situations.

Petitioner respectfully submits that the rules of statutory construction and pertinent legislative history dictate that 16 U.S.C. §§ 1, 2-4, are no authority for the Secretary's actions at Carlsbad Caverns National Park. The failure of the Court of Appeals to consider such relevant contentions should be reviewed by this Court because of the significance

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3. See *Hearings on S. 3463 Before the Senate Committee on Public Lands*, 62nd Cong., 2nd Sess. (1912); S. Rep. No. 676, 62nd Cong., 2nd Sess. (1912); *Hearings on H. R. 104 Before the House Committee on Public Lands*, 63rd Cong., 2nd Sess. (1914); *Hearings on H. R. 434 and H. R. 8668 Before the House Committee on Public Lands*, 64th Cong., 1st Sess. (1916); H. Rep. No. 700, 64th Cong., 1st Sess. (1916); S. Rep. No. 662, 64th Cong., 1st Sess. (1916); 53 Cong. Rec. 10362-65, 12150-52, 12632, 13004-05 (1916).

of this case and the effect of a decision herein in all states containing a great amount of federal land.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

JAMES A. MALONEY
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By /s/ JAMES E. SPERLING

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APPENDIX A

United States Constitution, Art. IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

39 Stat. 535, as amended, 16 U.S.C. § 1:

> There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

39 Stat. 535, as amended, 16 U.S.C. § 2:

> The director shall, under the direction of the Secretary of the Interior, have the supervision, man-

agement, and control of the several national parks and national monuments which on August 25, 1916, were under the jurisdiction of the Department of the Interior, and of the Hot Springs National Park in the State of Arkansas, and of such other national parks and reservations of like character as may be created by Congress. In the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior.

39 Stat. 535, as amended, 16 U.S.C. § 3:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, 4 22, and 43 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented,

or granted to any one on such terms as to interfere with free access to them by the public: *Provided, however,* That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation referred to in this section and sections 1, 2, 4, 22, and 43 of this title when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further,* That the Secretary of the Interior may grant said privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further,* That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing: *And provided further,* That the Secretary may, in his discretion, authorize such grantees, permittees, or licensees to execute mortgages and issue bonds, shares of stock, and other evidence of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging, or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments.

39 Stat. 535, 16 U.S.C. § 4:

The provisions of sections 1, 2, 3, 22, and 43 of this title shall not affect or modify the provisions of sections 79 and 522 of this title, and section 959 of Title 43.

New Mexico Statutes Annotated (Repl. 1962), § 53-2-7:

Unless and except as permitted by regulations made as in this act provided, or as otherwise allowed by law, it shall be unlawful:

(a) To hunt, take, capture, kill, or to attempt to take, capture, or kill, at any time or in any manner, any game animal, game bird, or game fish in the state of New Mexico.

(b) To possess, offer for sale, sell, offer to purchase or purchase, in the state of New Mexico, all or any part of any game animal, game bird, or game fish, taken, captured or killed in said state.

Violation of any of the provisions of this section shall constitute a misdemeanor, and any person convicted of violating any of the provisions hereof shall be punished as provided in section 7 [53-2-9] of this act.

New Mexico Statutes Annotated (Repl. 1962), § 53-3-23:

The state director may issue permits to any person to take, capture, kill, transport within or out of the state any game, birds or fish mentioned in this chapter at any time when satisfied that such person desires the same exclusively as specimens or for scientific or propagating purposes. Such permit shall be in writing and shall state the kind and number to be taken and the manner of taking, the name of the person to whom issued, the name of the place to which the same is to be transported and the name of the persons shipping such game, birds or fish, and shall be signed by him. Such permit shall not be transferable nor shall it be lawful to sell or barter any of the animals, birds or fish taken or exported under such permit for food purposes, and the holder of such permit shall be liable to the penalties provided in this chapter if he violates any of its provisions.

New Mexico Statutes Annotated (Repl. 1962), § 53-3-25:

The state game and fish warden may grant permits to owners or lessees of land for the capture or destruction on their lands of any protected game doing damage to their cultivated crops or property;

Provided, that on said permit or permits so issued as aforesaid, the state game and fish warden shall fix the numerical limit of any protected game so to be captured or destroyed and shall also therein fix the time limit within which any such protected game shall be so captured.

The state game and fish warden shall also grant permits, preferably to owners or lessees of land, for the capture of such beaver as interfere with the operation of any lawful canal, ditch or dam, or cause or threaten the destruction of private property and for the capture of beaver to be transferred from one stream to another, Provided, however, that all skins of beaver taken under the provisions of this section shall be turned into the state game and fish warden, to be by him sold and one-half of the proceeds therefor to be by said state game and fish warden conveyed into the game protection fund and the other one-half of the proceeds to be by said state game and fish warden turned over to the holder of said permit.

APPENDIX B

The NEW MEXICO STATE GAME COMMISSION, Plaintiff,

v.

Stewart L. UDALL, Secretary of the Interior, Stanley A. Cain, Assistant Secretary of the Interior, George Hartzog, Jr., Director of National Park Service, Neal G. Guse, Superintendent of Carlsbad Caverns National Park, R. R. Mabery, Chief Ranger, and Robert J. Schumerth, Neal R. Bullington, William J. Wilson, Robert M. Turner, Walter B. O'Neal, Walter H. Kittam, Derrick C. Cooke, Park Rangers, Defendants.

Civ. A. No. 7373.

United States District Court
D. New Mexico.
March 13, 1968.

Opinion

PAYNE, Chief Judge.

This is a contest between the New Mexico State Game Commission and the Secretary of the Interior and his delegates. Ostensibly, the issue presented concerns the Secretary's authority to order the destruction of wildlife in the Carlsbad Caverns National Park, in violation of New Mexico law, for the purpose of conducting a scientific research study. The broader issue presented relates to the role of the States in the activity of wildlife management. Because federal lands located in states other than New Mexico might be affected by the outcome of this dispute, a number of states have appeared as *amicus curiae*.

Plaintiff has requested (1) a declaratory judgment pursuant to 28 U.S.C. § 2201, and (2) that the defendants be enjoined from killing any more wildlife in the park. Defendants contend that they are acting within their authority and that this is in reality a suit, without consent, against the United States. They have responded with a motion for summary judgment.

The parties have filed herein a stipulation of the facts, and the case is being decided on its merits and not on the defendants' motion for summary judgment. Both parties desire that the Court decide the case on the stipulation as though a trial had been held.

When the parties signed and filed the stipulation of facts, the Court inquired whether the deer in question were to be killed to prevent injury to the park lands, or to permit a study to determine the likelihood of future depredation. The Court was informed that the Government did not intend to kill the deer because of present knowledge of depredation, but merely to gather information as the basis for a study. It has been stipulated that the State of New Mexico has offered to provide the defendants with state permits authorizing the killing of the deer, and that the defendants have refused the offer.

As mentioned, defendants contend this is, in reality, an unconsented-to suit against the United States. In this regard, the Court is cognizant of the rule that an officer of the United States, such as the Secretary of the Interior, is immune to suit in his official capacity when the suit is, in effect, one against the United States. However, there exists an exception to the rule where there are allegations that the officer's actions exceeded his statutory authority. Actions of an official that exceed his authority are not actions of the United States, and in such case, the doctrine of sovereign immunity does not apply. Malone v. Bow-

doin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10 Cir., 1960); Frost v. Garrison, 201 F.Supp. 389 (D.Wyo. 1962). In the instant case, plaintiff alleges that defendants are without authority to do the acts complained of, and the Court concludes that the doctrine of sovereign immunity does not preclude this action.

In the alternative to the contention that the defendants have exceeded their authority, plaintiff alleges that any such authority found to exist is clearly unconstitutional. Should it be determined that defendants were acting within their statutory authority, and that a substantial question of constitutionality with respect to the statute, or statutes, challenged exists, the Court would initiate the convening of a three-judge panel to hear the matter. Ex parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152, and cases following. However, insofar as the problem is one of statutory construction, and the constitutional question is not reached, the parties and the Court are in agreement that the case is not one appropriate for adjudication by a three-judge court.

The parties are apparently in agreement that the United States has not acquired exclusive jurisdiction over the Carlsbad Caverns National Park. If the Federal Government possessed exclusive jurisdiction over this area, a different problem would be presented. See, for example Chalk v. United States, 114 F.2d 207 (4 Cir., 1940), cert. denied, 312 U.S. 679, 61 S.Ct. 449, 85 L.Ed. 1118. No evidence to the contrary having been introduced, the Court concludes that the land in question was not acquired under circumstances which authorize the United States to exercise exclusive jurisdiction, and that New Mexico has not ceded exclusive jurisdiction over the area to the Federal Government. From this conclusion, it follows that the au-

thority of the Federal Government upon the Carlsbad National Park is not absolute. The question then remains whether Congress has provided the Secretary with the authority that he now asserts. If the asserted authority exists, State Law that is inconsistent therewith must fall.

According to the law of the State of New Mexico, the State Game Commission is charged with the responsibility of managing, controlling, and of regulating the hunting of all resident species of wildlife within the state. The defendants are charged by federal law with the responsibility of managing and controlling federal lands in the state, including the area known as Carlsbad Caverns National Park.

In accordance with a program planned by the National Park Service, the defendants notified the New Mexico State Game Commission that they intended to issue federal permits to persons selected by them authorizing the killing of fifty deer in the Carlsbad Caverns National Park. The killing would take place out of the New Mexico deer hunting season, and the consent and cooperation of the Game Commission would not be obtained. Thereafter, certain of the defendants were issued such permits by another of the defendants, and fifteen deer were killed. Pending a determination of their right to continue, defendants have temporarily abandoned the program.

The parties' stipulation includes facts already recited, and makes reference to an affidavit filed in this case by the Director of the National Park Service in describing the program which is underway on Carlsbad Caverns National Park. The Director states that the federal officers are conducting studies concerning the "Dry Season Food Habits of Deer" within the Carlsbad Caverns National Park, and he concludes that

> (T)hese research programs are absolutely necessary for proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage.

The responsibility of administering, protecting, and developing Carlsbad Caverns National Park is placed with the National Park Service, subject to the provisions of Title 16, Sections 1 and 2-4 of the United States Code. 16 U.S.C. § 407a. By the terms of Section 1 of Title 16, the National Park Service is obligated to implement the fundamental purpose of the national parks. This fundamental purpose is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The defendants assert they are conforming with this directive in conducting their present study. They rely for their authority, as well, upon Section 3 of Title 16, which authorizes the Secretary to "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks * * *."

Section 3 of Title 16 is clearly inapplicable in the present situation. No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim. It is the opinion of the Court that the Secretary's authority under this section must be predicated upon such a finding.

The question remains whether the broad mandate contained in Section 1 includes the authority the defendants have asserted. The Court has concluded that this section does not include such authority. Reading Section 1 of Title 16 as broadly as defendants contend it should be read would render Section 3 unnecessary, as the authority to order the destruction of wildlife "as may be detrimental to the use" of national parks would be provided without the specific authorization found in Section 3. It seems to the Court an unreasonable conclusion that Congress authorized an activity in Section 3 that was already permitted by Section 1. The conclusion that Congress intended the Secretary's authority to be proscribed by the conditions set forth in Section 3 seems the more logical to the Court.

Defendants rely in part upon Hunt v. United States, 278 U.S. 96, 49 S.Ct. 38, 73 L.Ed. 200 (1928). It seems to the Court that the defendants' reliance is misplaced, however, for that decision is distinguishable from the present case in more than one respect. In *Hunt*, the Supreme Court permitted the destruction of deer on a national forest and game preserve by United States officials, noting (1) that the deer were in such excess numbers "that the forage is insufficient for their subsistence" and the deer "have greatly injured the lands in the reserves by overbrowsing upon and killing valuable young trees, shrubs, bushes and forage plants", and (2) observance with the game laws of the State "would have so restricted the number of deer to be killed as to render futile the attempt to protect the reserves." 278 U.S. 96, 99, 100, 49 S.Ct. 38. Neither of the recited factors is present in this case. No depredation is known to be occurring, and New Mexico has offered to cooperate with the Federal officers. Clearly, *Hunt* does not authorize the killing of deer for

the purpose of conducting a study. No one doubts the Government's authority to protect its lands, and it seems to the Court that *Hunt* merely reaffirms that proposition, as does Section 3 of Title 16, U.S.C.

Section 53-3-23 of the New Mexico Statutes provides in pertinent part as follows:

> The state director may issue permits to any person to * * * kill * * * game * * * at any time when satisfied that such person desires the same exclusively * * * for scientific * * * purposes.

The Court concludes that Sections 1 and 2-4 of Title 16, U.S.C., do not authorize the destruction of wildlife upon the park for the purposes outlined in the Director's affidavit. The Court further concludes that enforcement of Section 53-3-23, New Mexico Statutes Annotated, quoted above, will not interfere with the Secretary's task as defined in 16 U.S.C. § 1. For these reasons, defendants must comply with Section 53-3-23, N.M.S.A. if they intend to pursue this study further.

This Court has jurisdiction to enjoin acts of officials which are unsupported by statutory authority. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Frost v. Garrison (D. Wyo. 1962) 201 F. Supp. 389; Harper v. Jones (10 Cir. 1952), 195 F.2d 705, and cases cited therein. Accordingly, it is the opinion of the Court that the defendants should be restrained and enjoined from the further killing of wildlife within the boundaries of Carlsbad Caverns National Park for the purpose of conducting a research study, unless they first secure authority for their acts by compliance with State Law.

This opinion shall constitute the Court's findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — 1969

THE NEW MEXICO STATE GAME COMMISSION,
Plaintiff-Appellee,
v.
STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,
Defendants-Appellants.

No. 58-68

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(No. 7373 Civil)

(Filed May 15, 1969)

Before PICKETT, LEWIS and HILL, Circuit Judges

PICKETT, Circuit Judge

The New Mexico State Game Commission brought this action seeking a judgment declaring that the Secretary of Interior and his subordinates did not have authority to kill deer within the boundaries of Carlsbad Caverns National Park in New Mexico for research purposes, without obtaining state permits required by New Mexico Statutes. The Commission also sought an injunction prohibiting further killing of deer without the state permit. The complaint alleged that under the law of New Mexico the Commission controls, regulates and manages the hunting of deer and other wildlife on all lands within the State of New Mexico; that the defendants were charged by federal law with the responsibility of managing and controlling lands in New Mexico known as "Carlsbad Caverns National Park"; that

the Commission was advised by the Park Superintendent that a "Deer Range Ecology Study" was to be undertaken which required the killing of not more than 50 deer within the park boundaries;[1] that some deer had been killed in violation of state law and the "announced scheme of killing fifty (50) deer" would be continued unless restrained. Attached to the complaint as exhibits was correspondence between the Park Superintendent and the Commission's Chief of Game Management.

Prior to the commencement of the action, a representative of the Commission was furnished with a statement of the objectives of the study and procedures to be followed. The value of the study to the State's overall management of one of its deer herds was acknowledged. Objection to the program arose only when the park officials refused to apply for state permits which had been offered. The trial court denied a motion to dismiss, holding that the action was not an unconsented suit against the United States. The case was disposed of on stipulated facts without a trial, and the court concluded that the aforesaid deer-killing program was not within the statutory authority of the Secretary of Interior or his subordinates, and enjoined further killing of the deer without a state permit. 281 F.Supp. 627. The district court recognized the "Government's authority to protect its lands" within the park boundaries, but held that the deer-killing program could be undertaken

1. The method of obtaining the deer desired for the study was described in a letter from the Park Superintendent to an appropriate representative of the Commission, as follows:

> "In connection with an in-depth research project entitled 'Deer-Range Ecology Study' the collection of deer paunches has been authorized. Research Biologist Walter H. Kittams and his assistant will be examining paunches and determining condition of deer obtained within the boundaries of the park by members of our uniformed staff. It is also possible that paunches from hunter-killed deer near the park boundary will be utilized if conditions warrant. At the present time we are stipulating that no more than 50 deer will be taken in the park in a 2-year period."

only after a showing or a finding that there was existing depredation caused by the deer. We are of the opinion that this narrow construction of the statute is unwarranted and hold that the research program to obtain reliable scientific information necessary to conserve the scenery and wildlife in the park was within the Secretary's statutory authority, and hence the case is an unconsented suit against the United States.

There is no dispute between the parties as to the general applicable law. As we stated in Harper v. Jones, 195 F.2d 705, *cert. denied*, 344 U.S. 821:

> "(W)here a federal officer acts within the limits of his legal power and authority and exercises a function legally delegated to him, an action to restrain him cannot be maintained without impleading the sovereign even though there is a claim of error in the exercise of that power or an abuse of discretion."

See also Larson v. Domestic and Foreign Corp., 337 U.S. 682; Ogden River Water Users Ass'n. v. Weber Basin Water Conservancy, 10 Cir., 238 F.2d 936; New Mexico v. Backer, 10 Cir., 199 F.2d 426; Frost v. Garrison, D.C. Wyo., 201 F.Supp. 389. These decisions, as well as a myriad of others, recognize that if a federal officer or employee acts beyond the power conferred upon him by Congress, the Immunity Rule has no application. The Court in *Larson* quoted with approval this language from Philadelphia Co. v. Stimson, 223 U.S. 605, 620:

> "(I)n case of injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. The principle has frequently been applied to state officers seeking to enforce unconstitutional enactments. (Citing cases). And it is equally applicable to a Federal officer acting in excess of his authority or under authority not validly conferred." 337 U.S. 690-1.

The basic question, then, as presented here, is whether the supervisory powers granted to the Secretary of Interior over the management of national parks authorize the killing of deer within Carlsbad Caverns National Park for an ecology study to determine deer range conditions within that park.

The Secretary does not assert that the United States has any ownership in wild animals within the various states. Court decisions indicate that, insofar as wild animals within a state are capable of ownership, they are owned by the state in its sovereign capacity for the benefit of its people, with the resulting right to regulate the taking thereof. See Lacoste v. Dept. of Conservation, 263 U.S. 545; Geer v. Connecticut, 161 U.S. 519; 3 C.J.S., Animals, §§ 4 and 5 where the decisions are collected. It is conceded that the Secretary has the authority to destroy animals to protect national park property.

In Hunt v. United States, 278 U.S. 96, the power of the Secretary of Agriculture to direct the destruction of large numbers of deer when such action was necessary to protect the lands of the United States from serious injury was upheld under a statutory provision authorizing the Secre-

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2. The conditions which determined the necessity of the study were stated in a recommendation of a department biologist, which states:

> "Mule deer occur throughout the park and are the major consumers of browse, but the park lacks adequate data for a deer management plan. Deer have caused deterioration of choice browse plants on most of the park. Their effect on other vegetation, which likely comprises the bulk of the deer diet on most range sites, is unknown. Major fluctuations in deer numbers have apparently occurred over the years, but their relation to available forage and other factors has never been documented. Predation and nearby hunter harvest probably exert only minor control, and deer numbers build to the limit of the forage resource. To avoid serious deterioration of habitat, and damage to associated wildlife, the park must have basic information on deer-range relationships, and a system for routinely determining trend of the deer population and habitat."

tary of Interior to "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which have been set aside or which may be hereafter set aside. . . ." 30 Stat. 31, 35.[3] Referring to the action taken by the Secretary, the Court said:

> "The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt, (citing cases), the game laws or any other statute of the state notwithstanding." Hunt v. United States, *supra*, at 100.

The State Commission and the amicus curiae, accepting the conclusion of the trial court,[4] here argue that the *Hunt* decision is limited to authorizing destruction of deer to prevent depredation on public lands known to be occurring. The essence of the argument is that the statute authorizes the killing of wild animals only upon a finding that there exists a present depredation of the park property by the animals to be killed. It is true that the statute herein referred to does not in so many words provide that animals within a park may be killed for research purposes,[5] but the act creating Carlsbad Caverns National Park provides that its "administration, protection and development . . .

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3. The foregoing power was later extended to the Secretary of Agriculture at 33 Stat. 628 (now 16 U.S.C. § 472). See United States v. Hunt, D.C. Ariz., 19 F.2d 634.

4. In the trial court's opinion it is stated:

> "Section 3 of Title 16 is clearly inapplicable in the present situation. No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim. It is the opinion of the Court that the Secretary's authority under this section must be predicated upon such a finding." 281 F.Supp. 627, at 629.

5. The statute under consideration in the *Hunt* case made no reference to the destruction of any wild animals on United States Forest lands.

shall be exercised under the direction of the Secretary of Interior by the National Park Service, subject to the provisions of sections 1 and 2-4 of this Title." 16 U.S.C. 407a. 16 U.S.C. § 1 creates the National Park Service and provides that it shall be under the charge of a director appointed by the Secretary of Interior. Clearly the Secretary has broad statutory authority to promote and regulate the national parks to conserve the scenery and wildlife therein "in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C § 1. Anything detrimental of this purpose is detrimental to the park. In addition to this broad authority, the Secretary is specifically authorized "in his discretion" to destroy such animals "as may be detrimental" to the use of any park. 16 U.S.C. § 3. The obvious purpose of this language is to require the Secretary to determine when it is necessary to destroy animals which, for any reason, *may be detrimental* to the use of the park. He need not wait until the damage through overbrowsing has taken its toll on the park plant life and deer herd before taking preventive action no less than he would be required to delay the destruction of a vicious animal until after an attack upon a person. In the management of the deer population within a national park the Secretary can make reasonable investigations and studies to ascertain the number which the area will support without detriment to the general use of the park. He may use reasonable methods to obtain the desired information to the end that damage to the park lands and the wildlife thereon may be averted.

The affidavit of the Director of the National Park Service describes the purpose of the research program and contains this statement:

> "That the Dry Season Food Habits of Deer and Deer-Range Relationship research programs which

are attached as Exhibits A and B contemplate the killing within the boundaries of Carlsbad Caverns National Park of approximately 50 deer by National Park Service employees. These research programs are absolutely necessary for the proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park; and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage."

The Commission's Chief of Game Management acknowledged the value of the study to the State's overall management of the deer herd within the area. Under these conditions the Secretary has statutory power to proceed with the ecology study, which requires the killing of some deer within the park boundaries, without interference from state authorities. In protecting the park property it is immaterial that the United States does not have exclusive jurisdiction over the lands within Carlsbad Caverns National Park. Nor are there any constitutional barriers to the procedure. Hunt v. Arizona, *supra*. The relief sought is in effect against the United States.

The action was not the result of the program itself, but was caused by a fear that the deliberate refusal to apply for the deer-killing permits was in furtherance of a "scheme" of the federal authorities to eventually take over the control and management of the wildlife on all federal lands.[6]

6. Typical of this position is the statement in the brief of amicus curiae International Association of Game, Fish and Conservation Commissioners:

"The basic question before this Court is whether federal officers may kill deer on (sic) a national park, in violation

This concern is understandable, particularly in public land states where a large percentage of the lands is owned by the United States, and upon which, in some instances, most of the state's game is found. If this threat is real, so far as the statutory power to manage the national parks is concerned, the remedy, we think, is not in the courts if there is no abuse of the discretion granted.

Reversed and remanded with instructions to dissolve the injunction and dismiss the action.

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of state law, for purposes of scientific research. Although appellants seek to justify such action on grounds that it is necessary to protect park lands, this occurrence is but one in a series of recent endeavors by the Department of the Interior to enter the field of game management, a role which has been historically and competently fulfilled by the States. Therein resides the interest of the Association in this proceeding. Interior Department administrators increasingly claim that, on federally owned lands, the federal government has the right to manage and control wildlife, including the right to take and dispose of such game as the Department deems appropriate, and the State may not interfere. The Association takes strong issue with this position and believes that it should not be allowed to pass without challenge."

In the amicus curiae brief filed by the State of Michigan it is said:

"If the Federal Government succeeds in this case in achieving its ultimate aim, as indicated in its brief, of securing complete control over fish and wildlife located on its lands on the theory of its ownership of such lands, it is the fear of the states that the next logical step will be to use this new power for the purpose of regulating hunting and fishing on these lands and charging a license for such a privilege."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
Petitioner,

v.

WALTER J. HICKEL, Secretary of the Interior, et al.,
Respondents.

BRIEF FOR THE STATE OF COLORADO, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR THE STATE OF COLORADO, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Statement of Interest

The State of Colorado through its Game, Fish, and Parks Division herein supports the New Mexico State Game Commission in its petition for writ of certiorari and presents its views concerning the serious and important issues presented to the Court. The question which most vitally concerns the people of the State of Colorado is whether the paramount right and authority to conserve, control, and manage resident species of wildlife for public use and benefit lies with the several States in accordance

with applicable state law or whether the United States in the exercise of a proprietary interest in land within a state has authority to exercise dominion over any species of wildlife on such land, contrary to state law?

The purpose of this brief is to inform the Court how the State of Colorado has viewed its historical role with respect to the ownership, management, and control of resident species of wildlife, and make explicit to the Court that failure to review and determine the issues in this cause could have a catastrophic impact upon wildlife management, and more importantly, game, fish, and parks development in the State of Colorado. No attempt is made herein to reiterate the legal argument set forth in Petitioner's brief.

II.

Historical Doctrine – State Ownership And Management of Game and Fish

62-1-1, CRS 1963, enacted in 1899 by the General Assembly of the State of Colorado, acknowledges the common law doctrine of state ownership of game and fish by providing:

> "All game and fish within this state not held by private ownership legally acquired, . . . are hereby declared to be the property of the state, and no right, title, interest or property therein can be acquired or transferred, or possession thereof had or maintained except as expressly provided in this chapter."

In *Maitland v. Peopel,* 93 Colo. 59, 60, 195 P. 2d 116, 117 (1933) the state Supreme Court affirmed and explained the statutory declaration by stating:

"... The power of the state to make regulations tending to conserve the game within its jurisdiction is based largely on the circumstance that 'the property right to the wild game within its borders is vested in the people of the state in their *sovereign* capacity; and, as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game . . .'"

(Emphasis supplied.)

Recognizing the importance of proper regulation and management of game and fish, the State of Colorado created by statute (62-2-1, CRS 1963) a Game, Fish, and Parks Department to be placed under the jurisdiction of the Game, Fish, and Parks Commission. (Now the Game, Fish, and Parks Division, which includes the Commission, placed under the jurisdiction of the Department of Natural Resources). The state legislature, in 62-2-16, CRS 1963, charged the commission, in addition to other duties, with the following responsibilities:

"For the purpose of providing an adequate and flexible system of protection, propagation, increase, control, and conservation of game, ... the commission is hereby authorized and directed to determine under what circumstances, when, and in what localities, by what means, and in what amounts and numbers, the same may be taken or killed ..., and thereupon by appropriate rules and regulations:

"Shall fix seasons and bag limits, shorten, extend or close seasons on any species of game ...

"Establish and close to hunting, trapping or fishing, game, bird, and fish refuges, and to close or open any

lakes or streams or parts thereof to fishing, to regulate and prescribe the means by which game and fish may be taken as in its judgment may be deemed best to perpetuate, increase, restore, or control any kind of game and fish, and assure a constant and adequate supply thereof..."

The state legislature has also conferred upon the commission the authority to destroy wild animals causing depredations, where, in 62-2-28, CRS 1963, it is stated:

"When in the judgment of the game, fish, and parks commission of the state of Colorado, it is deemed necessary to cause the destruction of any wild animals, whether protected by law or not, because of the fact that such animals have become detrimental to life, health, crops, timber, property or cultivation of lands, it is hereby authorized to kill, cause to be killed or grant permission to kill such animals under such rules and regulations as said commission deems necessary...."

Pursuant to the authority granted by the above statute, the department has gone on record as being capable of and willing to reduce herds on federal lands wherein depredations are occurring. In 1962 the department requsted permission from the National Park Service to conduct a controlled hunt in Rocky Mountain National Park for the purpose of reducing game herds to a manageable level. The National Park Service rejected the proposal.

Pursuant to 62-3-18, CRS 1963, the commission is also authorized to issue scientific collection permits.

As is evident from the authorities cited herein, the General Assembly of the State of Colorado and the Su-

preme Court of the State of Colorado have long considered this state, in the exercise of its sovereign authority, to have the paramount right to conserve and manage the resident species of wildlife acknowledged at common law to be owned by the State of Colorado in its sovereign capacity.

Congress and the Federal Government have long acquiesced to the States' historic right to exercise exclusive control over resident species of wildlife. Congress has not enacted any legislation relative to this subject matter which conflicts with state statutes or with rules and regulations prescribed by state conservation agencies. For many years, including the present, the Federal Government has actively solicited the various States to exercise their police power with respect to regulating, managing, and controlling resident species of wildlife situated on all lands within said states. The States have accepted this responsibility and are presently doing a professional job of management; in so doing, forage and herd quality have been substantially improved on federal land. The silence of Congress with respect to this subject matter is self-evident. Can the Federal Government now stand behind sophistry and specious legal reasoning and say that it has always had the authority to manage wildlife situated on federal lands, regardless of state law, and that it may exercise said authority piecemeal, when and where it deems provident. This ambivalent policy cannot be tolerated by the States. If the Federal Government wishes to manifest supremacy in the area of wildlife management, then let it present its case in the halls of Congress rather than attempting to pyramid legal authority based on an unstable foundation of ambiguous legislation and distinguishable Supreme Court cases.

III.

Federal Land Located In The State Of Colorado, And The Extent Of State Activity On Said Lands

33.4% of the lands located within the boundaries of the State of Colorado are federally-owned. Their breakdown within the federal hierarchy is as follows:

National Forest and Grasslands (USFS)	20.00%
National Park Land	.90%
Military Enclaves	.50%
Public Domain (BLM)	12.00%
Total Percentage	33.40%

The federally-owned land in Colorado totals 24,269,558 acres out of a total computed land area of 70,465,749 acres. Much of the prime hunting and fishing lands and waters are situated within the boundaries of federally-owned land. Of the elk and deer taken in Colorado during any one year, 80% of the elk and 50% of the deer are killed on federal land. The trout streams and lakes located in these areas are stocked by the people of the State of Colorado from monies collected by the Game, Fish, and Parks Division through the sale of hunting and fishing licenses. Wildlife management studies and projects are conducted by the division on federally-owned lands, and are partially financed from license revenues.

At the behest and with the blessing of the Federal Government, the division's dedicated and understaffed law enforcement section patrols and enforces state game and fish laws on most of the federal lands within Colorado. Again, the cost of law enforcement is born by the license holders.

As an indication of the magnitude of the state's responsibility with respect to the regulation and management of wildlife related functions in Colorado, we cite to the Court the following figures showing the number of game, fish, and related licenses issued in the year 1968:

Hunting	415,329
Fishing	464,843
Total Licenses	880,172

Total revenue in 1968 derived from the sale of such licenses was $10,040,387. These figures should be compared with 1935 when 90,829 licenes were sold and the revenue derived therefrom was $217,849.00. The 1969 figures show an increase in all categories.

It is clear from the above information that game and fish related recreational activities is big business in Colorado. Of the 880,172 licenses sold in 1968, 231,133 were purchased by nonresidents. The State of Colorado is a paradise for the outdoorsman, attracting nonresident hunters, fishermen, and other outdoor enthusiasts by the thousands. Colorado's tourist and resort business, due largely to its hunting and fishing possibilities, is one of the largest industries in the state.

IV.

Conclusion

We of the State of Colorado believe that issues raised in the instant cause are of great importance to every state wherein federally-owned lands are situated. If the Federal Government is allowed to make continued encroachments upon the States' historic right to manage and regulate resident species of wildlife, then, it is logically

to be expected, state game and fish laws, including licensing requirements, will be disregarded with impunity by the public. The jurisdictional foundation upon which states promulgate and enforce game and fish laws will be destroyed. Numerous state conservation agencies will have to close their doors. Management of many great hunting and fishing areas in this country will fall to those less able to meet the obligations of this vital trust responsibility.

The State of Colorado respectfully requests this Honorable Court to grant certiorari in this cause.

Respectfully submitted,

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INDEX

	Page
Interest of Amicus Curiae	2
Statement of the Case	3
Reasons for Granting the Writ:	
I. The National Park Service Act as Construed by the Court Below Is in Excess of the Power of Congress Under Article IV, Section 3, Clause 2 of the U. S. Constitution and Thereby an Intrusion Upon State Legislative Authority	5
II. The Decision Below Undermines the Concept of State Ownership of Resident Species of Wildlife	11
Conclusion	14

AUTHORITIES

CASES:

Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965)	7
Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939)	7
Camfield v. United States, 167 U.S. 518 (1897)	9
Colorado v. Toll, 268 U.S. 228 (1925)	9
Cummings v. People, 211 Ill. 392, 71 N.E. 1031 (1904)	7
Florida v. United States, 282 U.S. 194 (1931)	6
Florida Avocado Growers v. Paul, 373 U.S. 132 (1963)	6
Geer v. Connecticut, 161 U.S. 519 (1896)	7, 11
Hamilton v. Williams, 145 Fla. 697, 200 So. 80 (1941)	7
Harper v. Galloway, 58 Fla. 255, 51 So. 226 (1910)	7
Hornbeke v. White, 20 Colo. App. 13, 76 Pac. 926 (1904)	7
Hunt v. United States, 278 U.S. 96 (1928)	6, 8
Hyde v. State, 155 Ala. 133, 46 So. 489 (1908)	7
International Ass'n of Machinists v. Street, 367 U.S. 740 (1961)	6
Judd v. Bernard, 49 Wash. 2d 699, 304 P.2d 1046 (1956)	7
Kansas v. Colorado, 206 U.S. 46 (1907)	10

Page

Lacoste v. Department of Conservation, 263 U.S. 545 (1924) 7
Lynch v. Overholser, 369 U.S. 705 (1962) 6
Magner v. People, 97 Ill. 320 (1881) 7
McCready v. Virginia, 94 U.S. 391 (1877) 7
Missouri v. Holland, 252 U.S. 416 (1920) 8
New Mexico State Game Comm'n v. Udall, et al., 410 F.2d 1197 (10th Cir. 1969) 4, 6
New Mexico State Game Comm'n v. Udall, et al., 281 F. Supp. 627 (D. New Mex. 1968) 4
People v. Zimberg, 321 Mich. 655, 33 N.W. 2d 104 (1948) 7
Shapiro v. United States, 335 U.S. 1 (1948) 6
State v. McCullagh, 96 Kan. 786, 153 Pac. 557 (1915) 7
State v. Sawyer, 113 Me. 458, 94 Atl. 886 (1915) 7
State v. State Fish & Game Comm'n, 437 P.2d 373 (Mont. 1968) 7
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930) 8
Toomer v. Witsell, 334 U.S. 385 (1948) 11, 12
Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 9

OTHER:

U.S. Constitution, Article IV, Section 3, Clause 2 .... 6, 9
16 U.S.C. § et seq. (1964) 4
16 U.S.C. § 3 (1964) 4, 5, 6, 9, 10, 11
16 U.S.C. § 24 (1964) 8
16 U.S.C. § 95 (1964) 8
16 U.S.C. § 117 (1964) 8
36 Ops. Att'y Gen'l 527 (1932) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION, *Petitioner*

v.

WALTER J. HICKEL, Secretary of the Interior, ET AL., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE

The International Association of Game, Fish and Conservation Commissioners (hereafter "the Association"), amicus curiae, urges that the petition prayed by the New Mexico State Game Commission for a writ of certiorari to review the decision of the U. S. Court of Appeals for the Tenth Circuit in this case be granted.

INTEREST OF AMICUS CURIAE

The Association is a voluntary, unincorporated association, dedicated to coordinating the efforts of public administrative agencies responsible for the protection, preservation, and management of the game, furbearers, fish, birds, forests, waters, and soils of North America. Founded at Yellowstone National Park in 1902, the Association numbers as government members the fish and game departments of all fifty States and of seven Canadian provinces. The National Park Service administers areas in many states, with a total acreage in excess of 29 million acres. Total federal ownership of land is much more extensive, amounting to approximately 33 per cent of the total acreage of the fifty States and the District of Columbia. In the public land states of the West, sizable areas are in federal ownership as indicated by the percentages of total acreage of the listed States: Alaska (97%), Nevada (86%), Utah (67%), Idaho (64%), Oregon (52%), Wyoming (47%), Arizona (45%), California (44%), Colorado (36%), New Mexico (34%), Montana (30%), and Washington (29%).[1] Federally owned lands often furnish superior game habitat, and revenues to the States mentioned above from sale of hunting and fishing licenses amounted to approximately $45 million dollars in fiscal year 1967.[2] It is believed that well over half of this hunting and fishing effort occurred

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[1] Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967, General Services Administration, Washington, D. C., Table 4, p. 46.

[2] Number of Paid Hunting and Fishing License Holders, License Sales and Cost to Hunters and Fishermen, Fiscal Year 1967, Bureau of Sports Fisheries and Wildlife, U.S. Department of the Interior, Washington, D. C.

on lands owned by the federal government. Due to the magnitude of the federal holdings, it is of prime importance to amicus curiae that the limits of federal authority over wildlife be maintained.

STATEMENT OF THE CASE

In October 1967 the Superintendent of Carlsbad Caverns National Park, a national park owned by the United States of America and located in Eddy County, New Mexico, advised the New Mexico Department of Game and Fish that a research project would be undertaken by federal officers on the park. The Department was further notified that as part of the research project, entitled "Deer-Range Ecology Study," deer paunches would be collected and examined, and up to fifty deer would be killed on park lands for this purpose. In answer to this notification, the state game and fish agency noted that such a study would be of value but that prior to any deer collection it would be necessary that collecting permits be issued to cover such activity. The agency's letter further stated: "If you will furnish us a list of the personnel whom you plan to assign the collection of these deer, we will be happy to issue the necessary permits and to make arrangements with our District Conservation Officer Leonard Gonce for the legal disposition of the carcasses." Prior to October 1967 the National Park Service had on numerous occasions requested and obtained from the New Mexico Department of Game and Fish scientific collectors' permits under appropriate state law authorizing Park Service personnel to take, capture and kill on the park designated species of protected wildlife. In reply, the Park Superintendent stated, "Inasmuch as this is a Federal project carried

out on Federal lands, we do not consider it necessary that our men have collecting permits issued by your Department."

After several deer had been killed by federal officers, the New Mexico State Game Commission filed its complaint in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief against the Secretary of the Interior and other departmental officials and personnel. Plaintiff alleged that pursuant to the law of New Mexico the State Game Commission is charged with the responsibility of managing, controlling and regulating the hunting of all resident species of wildlife within the State, and argued that defendants' actions were in excess of statutory authority, but that if found to be within statutory authority, such statute would be unconstitutional.

The District Court sustained New Mexico's claim that the killing of deer for the purpose of conducting a scientific research study was not within the authority bestowed by Congress in the National Park Service Act of 1916, 16 U.S.C. § 1 et seq. (1964). Specifically, the District Court held that the killing of deer was not authorized by 16 U.S.C. § 3 (1964), which authorizes that the Secretary of the Interior may "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks." This section was held inapplicable since "No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim." *New Mexico State Game Comm'n* v. *Udall, et al.*, 281 F.Supp. 627, 631 (D. New Mex. 1968). Defendants were thus enjoined from the further killing of wildlife within the

boundaries of Carlsbad Caverns National Park for the purpose of conducting a research study without first securing authority for their acts by compliance with State law.

On appeal to the United States Court of Appeals for the Tenth Circuit, that Court reversed, holding that the authority to destroy such animals as may be detrimental to the use of the park allows the Secretary to "use reasonable methods to obtain the desired information to the end that damage to the park lands and the wildlife thereon may be averted." *New Mexico State Game Comm'n* v. *Udall, et al.*, 410 F.2d 1197, 1201 (10th Cir. 1969).

REASONS FOR GRANTING THE WRIT

I. The National Park Service Act as Construed by the Court Below Is in Excess of the Power of Congress Under Article IV, Section 3, Clause 2 of the U. S. Constitution and Thereby an Intrusion Upon State Legislative Authority

The question here presented is whether federal officers on a national park may destroy protected species of resident wildlife in violation of state law not for the reason that such action is necessary to protect park lands from injury but on the ground that scientific information obtained could be useful at some future time in averting injury to park land. The court below found sanction for such conduct in a statute authorizing the Secretary of the Interior "to provide in his discretion for destruction of such wildlife as may be detrimental to the use of the park." 16 U.S.C. § 3 (1964). In response to the contention that the statute so construed would be in excess of congressional power, the court below simply declared, "Nor are there any constitutional barriers to the pro-

cedure," citing *Hunt* v. *United States,* 278 U.S. 96 (1928). *New Mexico State Game Comm'n* v. *Udall, et al.,* 410 F.2d at 1201.[3]

Numerous decisions of federal and state courts establish the proposition that the States possess authority

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[3] In so ruling, the court below went far beyond the holding of this Court in *Hunt* v. *United States,* 278 U.S. 96 (1928), where reduction of overabundant deer "was necessary to protect the lands of the United States within the reserves from serious injury [as] is made clear by the evidence." 278 U.S. at 100. In adopting an expansive interpretation of 16 U.S.C. § 3 (1964), the court below also rejected several rules of statutory construction indicating more limited scope to the statute. First, that a statute be interpreted, if fairly possible, so as to free it from not insubstantial constitutional doubt. *Lynch* v. *Overholser,* 369 U.S. 705, 711 (1962); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961). Second, that solicitude for state interests requires showing of a clear and manifest purpose on the part of Congress to justify intrusion into the domain of state power and that justification for such an exercise of federal authority must be clearly present. *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 146-47 (1963); *Florida* v. *United States,* 282 U.S. 194, 211-12 (1931). Third, absent indication to the contrary, it may be presumed that Congress was aware of decisions recognizing state ownership of game as well as decisions under the Property Clause of the U.S. Constitution, Art. IV, § 3, cl. 2, dealing with power to protect lands of the United States and therefore that Congress acted with such decisions in mind. See *Lynch* v. *Overholser,* 369 U.S. 705, 710-11 (1962); *Shapiro* v. *United States,* 335 U.S. 1, 16 (1948). Finally, in interpreting 16 U.S.C. § 3 (1964), the court below did not see fit to discuss in its opinion relevant legislative history; concern in Congress over interference by the federal government with game subject to state regulation which served as a backdrop to the National Park Service Act of 1916; and contemporaneous expressions of opinion by the National Park Service in 1917 having to do with the extent of authority under 16 U.S.C. §3 (1964). Nor did the court below see fit to discuss the administrative practice of Park Service officials prior to October 1967 in seeking state permits before collecting protected species on the park. All of these factors and aids to interpretation point away from the construction adopted by the court below.

to regulate and control the taking of resident species of wildlife within their borders. E.g., *Lacoste* v. *Department of Conservation,* 263 U.S. 545 (1924); *Geer* v. *Connecticut,* 161 U.S. 519 (1896); *McCready* v. *Virginia,* 94 U.S. 391 (1877); *Hyde* v. *State,* 155 Ala. 133, 46 So. 489 (1908); *Begay* v. *Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939); *Hornbeke* v. *White,* 20 Colo. App. 13, 76 Pac. 926 (1904); *Harper* v. *Galloway,* 58 Fla. 255, 51 So. 226 (1910); *Magner* v. *People,* 97 Ill. 320 (1881); *State* v. *McCullagh,* 96 Kan. 786, 153 Pac. 557 (1915); *State* v. *Sawyer,* 113 Me. 458, 94 Atl. 886 (1915); *People* v. *Zimberg,* 321 Mich. 655, 33 N.W. 2d 104 (1948); *State* v. *State Fish & Game Comm'n,* 437 P.2d 373 (Mont. 1968); *Allen* v. *McClellan,* 75 N.M. 400, 405 P.2d 405 (1965); *Judd* v. *Bernard,* 49 Wash. 2d 699, 304 P.2d 1046 (1956). State authority, as indicated in *Geer* v. *Connecticut, supra,* stems from the fact that authority is lodged in the state as a result of the common ownership of game by all the people of the state, which power is to be exercised as a trust for the benefit of the people. 161 U.S. at 529.[4] Nor is the right to regulate resident species of fish and game affected by ownership of land upon which wildlife may be found. *E.g., Hamilton* v. *Williams,* 145 Fla. 697, 200 So. 80 (1941); *Cummings* v. *People,* 211 Ill. 392, 71 N.E. 1031 (1904); *Allen* v. *McClellan, supra.*

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[4] In addition to authority deriving from ownership, state authority may also be upheld as an exercise of police power. Thus, as stated in *Geer,* "Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end . . . ." 161 U.S. at 534.

It is equally well settled that the federal government may acquire lands necessary or convenient for the exercise of its powers within a state. Absent state consent or a cession of jurisdiction, exclusive jurisdiction does not accrue to the federal landowner. "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650 (1930). See 36 Ops. Att'y Gen'l 527, 530 (1932).

In many national parks exclusive jurisdiction resides in the United States pursuant to cession by state legislatures. E.g., 16 U.S.C. § 24 (1964) (Yellowstone National Park); 16 U.S.C. § 95 (1964) (Mount Rainier National Park); 16 U.S.C. § 117 (1964) (Mesa Verde National Park). The State of New Mexico has made no cession of jurisdiction with respect to Carlsbad Caverns National Park. As a result, the United States does not possess exclusive jurisdiction over the Park, and the right to regulate wildlife resides in the State of New Mexico as an attribute of sovereignty subject only to a valid exercise of authority under the Constitution. Thus, for example, the federal treaty power prevails over the state interest, *Missouri* v. *Holland*, 252 U.S. 416 (1920), and notwithstanding state game laws the federal government may undertake reasonable steps to protect its lands from serious injury. *Hunt* v. *United States*, 278 U.S. 96 (1928). The question

here is whether federal officers may destroy deer in violation of state law in order, as the Park Service affidavit states, "that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage." Amicus submits that such action intrudes upon the legislative authority of the State of New Mexico, *Colorado* v. *Toll,* 268 U.S. 228 (1925), and that, construed to authorize destruction for such purpose, 16 U.S.C. § 3 (1964) is in excess of congressional power under the Property Clause of the U. S. Constitution, Art. IV, § 3, cl. 2.

This Court has on several occasions discussed the scope of the Property Clause, the decisions indicating that the power therein granted is of a protective nature and not one designed to intrude upon state authority. In *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 405 (1917), the power with respect to lands owned by the United States was described as "the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power." In *Camfield* v. *United States,* 167 U.S. 518 (1897), this Court stated that the power encompassed the rights of an ordinary proprietor as well as a power analogous to the police power of the several states. However, the Court declared that such power was not without limits:

> While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within

> a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, *so long as such power is directed solely to its own protection.* 167 U.S. at 525-26 (Emphasis added.)

The limits of power under the Property Clause were further delineated in *Kansas* v. *Colorado,* 206 U.S. 46 (1907), an original bill in the Supreme Court to enjoin diversions of the Arkansas River. The United States intervened for the purpose of asserting a superior authority with respect to the flow of the Arkansas. Rejecting such claims except with respect to preservation or improvement of navigability, the Supreme Court discussed the Property Clause in the following:

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. *But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* 206 U.S. at 89. (Emphasis added.)

Amicus submits that, as construed by the court below, 16 U.S.C. § 3 is in excess of congressional power

under the Property Clause. Where exclusive jurisdiction over an area does not reside in the United States, state game laws and regulations are applicable, and Congress may not by the establishment of a national park restrict the jurisdiction of a state over wildlife. If Congress chooses, it may of course restrict or prohibit hunting and fishing on federal lands, and no quarrel could exist were 16 U.S.C. § 3 construed to authorize destruction of wildlife, state law to the contrary notwithstanding, where such action is reasonably necessary to protect federal land from serious injury. But the concept approved by the court below, that state law may be overriden on the ground that destruction of wildlife would be useful as opposed to being necessary, is so potentially disruptive of federal-state relations that the concept should be rooted out by this Court.

II. The Decision Below Undermines the Concept of State Ownership of Resident Species of Wildlife

As stated in *Geer* v. *Connecticut, supra,* "The wild game within a state belongs to the people in their collective sovereign capacity." 161 U.S. at 529. It is manifestly clear, as set forth in *Geer,* that before the federal government was created the States possessed sovereign power with respect to fish and game within their borders, which power was not ceded to the national government. At the same time it is likewise settled that state authority over wildlife must be exercised within the confines of applicable constitutional limitations. As indicated above, state law yields where in conflict with a treaty made under the authority of the United States, and a state may not discriminate without reason against citizens of other states in violation of the Privileges and Immunities Clause. *Toomer* v. *Witsell,* 334 U.S. 385 (1948).

Attorneys for respondent apparently read this Court's decision in *Toomer* v. *Witsell, supra*, as applying the coup de grâce to the doctrine of state ownership of wildlife for the benefit of its people. In a report to the Public Land Law Review Commission, a commission created by Public Law 88-606 to undertake a comprehensive study of the public land laws, the Department of Justice recently stated: "The important point to remember when reading cases such as *Geer* is that, without exception, they have involved disputes between a state and an individual. In no case decided by the Supreme Court has the State power been successfully asserted over the Federal Government. Subsequent Supreme Court decisions have made it quite clear that, state contentions as to ownership of wildlife notwithstanding, the true basis of state authority rests on their police power." Letter of Acting Ass't Att'y Gen'l Taylor dated April 7, 1969, to Hon. Wayne N. Aspinall, Chairman, Public Land Law Review Commission, p. 5. Elsewhere in the same report, the Department of Justice declares the law to be that "The Federal Government, as manager of its own lands and property, may make different regulations [regarding resident wildlife] if Congress chooses, as appropriate to accomplishment of the purposes to which those lands are devoted." Id., p. 9.

Amicus submits that this Court has not interred the doctrine of state ownership, and such notion should be dispelled. In *Toomer* v. *Witsell, supra*, Chief Justice Vinson indeed described the ownership theory as a "fiction" but "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402. And, in a con-

curring opinion, Justice Frankfurter for himself and Justice Jackson emphasized the need to read the Privileges and Immunities Clause in conjunction with the Tenth Amendment which "presupposes the continued retention by the State of powers that historically belonged to the States and [which] were not explicitly given to the central government or withdrawn from the States." 334 U.S. at 408. Referring to the Privileges and Immunities Clause, Justice Frankfurter stated:

> This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408 (concurring opinion).

Amicus submits the Property Clause must be read in conjunction with the Tenth Amendment which presupposes State ownership of wildlife for the common good. The court below recognized state ownership of wildlife but apparently determined that it had no bearing on the extent of the authority with which the Secretary could be clothed in the instant case. It is submitted that the limits of power under the Property Clause are exceeded where federal officers are authorized to destroy wildlife in violation of state law where not reasonably necessary to protect federal lands from injury.

The decision below and the extravagant view of federal authority entertained by attorneys for respondent

can only result in continued jurisdictional disputes over wildlife protected by state law. The issue is of such importance that further disputes should be forestalled by this Court.

CONCLUSION

For the foregoing reasons and for those set forth in the Petition of the New Mexico State Game Commission, amicus-curiae urges that the Commission's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was today served upon the parties to this proceeding by causing a copy thereof to be mailed via first-class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by causing a copy thereof to be mailed via air mail, postage prepaid, to George T. Harris, Jr., Special Assistant Attorney General for the State of New Mexico, Public Service Building, P. O. Box 2168, Albuquerque, New Maxico 87103.

MARTIN L. FRIEDMAN

Dated: September 19, 1969.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitution and statutes involved	3
Statement	4
Argument	8
Conclusion	14

CITATIONS

Cases:	
Alabama v. *Texas*, 347 U.S. 272	12
Arizona v. *California*, 283 U.S. 423	13
Florida Lime and Avocado Growers, Inc. v. *Jacobsen*, 362 U.S. 73	9, 11
Gibson v. *Chouteau*, 13 Wall. 92	12
Hunt v. *United States*, 278 U.S. 96	7, 9, 13
Jameson & Co. v. *Morgenthau*, 307 U.S. 171	8, 9
Poresky, Ex Parte, 290 U.S. 30	9
Swift & Co. v. *Wickham*, 382 U.S. 111	9, 10
Zemel v. *Rusk*, 381 U.S. 1	9
Constitution and statutes:	
U.S. Constitution:	
Article IV, Section 3	12
Article IV, Section 3, clause 2	3
Article VI, clause 2	3, 9, 12
Tenth amendment	2, 3, 7, 8, 9
Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1	3, 4, 8, 11
16 U.S.C. 2–4	4, 8, 11
16 U.S.C. 3	3, 11
16 U.S.C. 407a	4, 11
28 U.S.C. 2281	8, 9
28 U.S.C. 2282	4, 8, 9, 10

365-626—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
PETITIONER

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR,
ET AL.

No. 919 Misc.

THE NEW MEXICO STATE GAME COMMISSION,
PETITIONER

v.

UNITED STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (No. 569, Pet. App. A13–20) is at 410 F. 2d 1197. The opinion of the district court (No. 569, Pet. App. A6–A12) is reported at 281 F. Supp. 627.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1969. On June 13, 1969, the court of appeals denied a petition for rehearing and, alternatively, for the issuance of a writ of mandamus directing the convening of a three-judge district court. On July 17, 1969, the district court denied a petition for the convening of a three-judge court. On September 9, 1969, petitioner filed a motion in this Court for leave to file a petition for a writ of mandamus directing the convening of a three-judge district court. No. 919 Misc. On September 9, 1969, a petition for a writ of certiorari was filed. No. 569. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the convening of a three-judge district court was required to determine petitioner's challenge to the application of federal statutes, where a single judge initially concluded that the relief sought must be granted without having to reach constitutional questions and the reviewing court of appeals, in reversing, implicitly found the constitutional question presented to have been frivolous.

2. Whether federal officials wishing to kill game on federal land in order to study the ecology of the federal land are required first to secure the permission of the state in which the land is located.

3. Whether the contention that the Tenth Amendment to the Constitution requires that the officials secure such permission raises a substantial constitutional issue.

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 3, clause 2, of the United States Constitution, reads in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

Article VI, clause 2, of the United States Constitution, reads, in pertinent part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1, 3, reads in pertinent part:

> § 1. There is created in the Department of the Interior a service to be called the National Park Service * * *. The service thus established shall promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means

as will leave them unimpaired for the enjoyment of future generations.

§ 3. The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments or reservations. * * *

Section 2282 of Title 28, U.S.C., provides:

§ 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

STATEMENT

Carlsbad Caverns National Park, located within New Mexico, belongs to the United States. Congress has placed the administration of the Park in the National Park Service, to be exercised under the direction of the Secretary of the Interior, subject to the provisions of 16 U.S.C. 1, 2–4. 16 U.S.C. 407a.

In December 1967, officials of the Park Service undertook a program to kill a limited number of deer in Carlsbad Caverns National Park pursuant to a

Deer-Range Ecological Study designed to discover if the Park's forage was being overbrowsed, and to obtain other scientific information for use in making decisions affecting the management and administration of the Park and to preserve and protect its lands from injury or damage. This program was explained by the Director of the National Park Service in an affidavit as follows (No. 569, Pet. App. A18–A19):

> That the Dry Season Food Habits of Deer and Deer-Range Relationship research programs which are attached as Exhibits A and B contemplate the killing within the boundaries of Carlsbad Caverns National Park of approximately 50 deer by National Park Service employees. These research programs are absolutely necessary for the proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park; and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage.

The conditions which gave rise to the study were explained in a recommendation of a department biologist (*id.*, A16):

> Mule deer occur throughout the park and are the major consumers of browse, but the park lacks adequate data for a deer management plan. Deer have caused deterioration of choice

> browse plants on most of the park. Their effect on other vegetation, which likely comprises the bulk of the deer diet on most range sites, is unknown. Major fluctuations in deer numbers have apparently occurred over the years, but their relation to available forage and other factors has never been documented. Predation and nearby hunter harvest probably exert only minor control, and deer numbers build to the limit of the forage resource. To avoid serious deterioration of habitat, and damage to associated wildlife, the park must have basic information on deer-range relationships, and a system for routinely determining trend of the deer population and habitat.

When New Mexico officials were advised of the proposed study, they sought to require those who would kill the deer to obtain state permits, which would be readily available for such purposes. The federal officials refused to submit to state jurisdiction in this manner, "[i]nasmuch as this is a Federal project carried out on Federal lands * * *" (No. 919 Misc., Pet. App. A10). The state game commission then brought suit in the United States District Court for the District of New Mexico on stipulated facts (*id.*, A10–A13) for declaratory and injunctive relief against the federal officers concerned. The game commission claimed primarily that federal officials had no federal statutory authority to kill game on federal reserves subject to concurrent state jurisdiction, as is Carlsbad Cavern National Park, unless the killing was for the immediate purpose of protecting the federal property from harm (*id.*, A3). The killing here was to collect information about possible future depredation (*id.*, A14). "[S]olely in the alterna-

tive" (*id.*, A3), the game commission claimed that any statutory authority that might exist would be unconstitutional as an interference with rights reserved to the states and the people by the Tenth Amendment.

Although the district court stated that a three-judge court would be required if the constitutional question was to be reached and were found to be substantial, it and the parties agreed that no such procedure need be followed if the case could be disposed of on statutory grounds alone. On the statutory issue, the court held that federal officials were authorized to kill game only for the immediate purpose of protecting federal property from damage or destruction, so that the killings here, for research into possible future damage and destruction, were unauthorized. It therefore enjoined future unlicensed killing of deer for this purpose by federal officials.

An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which reversed. It found broad statutory authority in the Secretary to conserve scenery and wildlife, which in its view extended to ecological studies such as had been proposed in this case, as well as specific authority to destroy such animals as, "in his discretion," may be "detrimental to the use of any park. 16 U.S.C. § 3." It dismissed the constitutional challenge in a single sentence, as clearly foreclosed by this Court's decision in *Hunt* v. *United States*, 278 U.S. 96. Petitioner then unsuccessfully sought, in the Tenth Circuit, rehearing and mandamus to compel the convening of a three-judge district court and, in the district court, the convening of a three-judge district court.

ARGUMENT

1. The basis for the game commission's claim that a three-judge district court was required in this case is 28 U.S.C. 2282, which forbids the granting of "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution * * * unless the application therefor is heard and determined by a district court of three judges." We believe that convening such a court in this case was not required, for several reasons.

a. Unlike the parallel act providing for three-judge district courts in cases involving the possibility of injunctive relief against state officials acting under state law, 28 U.S.C. 2281, Section 2282 refers only to injunctive relief against federal statutes, and not administrative interpretations under those statutes. As this Court recognized in *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173–174, this limitation is a deliberate one. It requires that the constitutionality of an Act of Congress be directly in issue for the three-judge court provision to apply. Here, petitioner does not challenge the general constitutionality of 16 U.S.C. 1, 2–4, which so far as relevant here simply authorize the Secretary to act in a manner consistent with federal interests in conservation. Rather, petitioner alleges that if the Secretary administratively construes his authority as including authority to take the action proposed in this case, then that construction is invalid as offending the Tenth Amendment. But such construction of a statute, involving interpretation of general language in a restricted factual context, is essentially an administrative act. *Ibid.* The constitu-

tionality of the Act of Congress itself is not called into question, and accordingly, the three-judge requirement does not apply.

b. As the Court also recognized in *Jameson,* three judges are not required unless the constitutional question raised is substantial. Putting aside the question whether an argument based on "reserved powers" under the Tenth Amendment is not the equivalent for Section 2282 of the Supremacy Clause argument as to which three judge courts are not required under Section 2281, *Swift & Co.* v. *Wickham,* 382 U.S. 111, the argument as made in this case is plainly insubstantial. Among the tests of insubstantiality are whether an argument's "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky,* 290 U.S. 30, 32 and cases cited. As we show below, pp. 12–13, and the court of appeals plainly concluded in its summary treatment of the issue, petitioner's argument is clearly foreclosed by the decision of this Court in *Hunt* v. *United States,* 278 U.S. 96. The fact that the court of appeals expressed its conclusion on the merits rather than in terms of insubstantiality is, in the circumstances, simply a formality which does not deprive its judgment of judicial force.

c. This Court has several times stated that the fact that non-constitutional claims are joined with constitutional ones does not suspend application of the three judge requirement. *E.g., Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73; *Zemel* v. *Rusk,* 381 U.S. 1. Each of these cases, however, has come

before this Court as an appeal from a three-judge district court; in convening that court, it necessarily had been concluded as an initial matter that the cases there involved substantial constitutional questions which the trial court might be required to reach. Here, on the contrary, the trial court initially concluded that he would not have to reach the constitutional questions presented, substantial or not, because in his view petitioners were entitled to the relief they sought on an entirely statutory basis.

Such inquiry is fully as appropriate under Section 2282 as the initial inquiry into the substantiality of the constitutional challenge presented. In terms, Section 2282 requires a three judge court only for cases where injunctive relief is "granted" on constitutional grounds. This Court has frequently stated that the convening of three judge courts is not to be favored, and that accordingly the statutes are to be construed in a technical fashion. *E.g., Swift & Co.* v. *Wickham, supra,* 382 U.S. at 124. Both mandates are satisfied by a construction which permits the single district judge to refrain from convening the extraordinary tribunal if he first determines that the constitutional question will not be reached.[1] The substantiality question is such a determination; so is the determination, made by the district court in this case, that the relief sought can be granted on statutory grounds alone.

[1] We do not contend that he must make such an inquiry. In cases unlike this one, there may be complex factual issues or other reasons to make an initial determination of the non-constitutional grounds inappropriate.

This construction does not give rise to the objection, which was decisive in *Florida Lime and Avocado Growers, supra,* that single judge district courts would be called upon to determine constitutional questions, in contravention of the statute. The single judge's determination is only that the constitutional question need not be reached because the plaintiffs are entitled to relief on other grounds. Should he prove wrong on appeal, and should the constitutional question presented be substantial, a three judge court may be convened at that time. But the court of appeals could determine in reversing the statutory ground, as the court in essence did here, that the constitutional question was not a substantial one, and on that basis order the suit dismissed.

2. The court of appeals correctly interpreted the Secretary's statutory authority as permitting the action he proposes to take in this case—a question as to which there is, in any event, neither conflict among the circuits nor any other matter of importance warranting the grant of certiorari in this case.

The act creating Carlsbad Caverns National Park provides that it is to be administered by the Secretary, through the National Park Service, under the provisions of 16 U.S.C. 1, 2–4. 16 U.S.C. 407a. The provisions of 16 U.S.C. 1 confer broad authority on the Secretary to act "to conserve the scenery and the natural and historic objects and the wildlife therein * * * in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Under 16 U.S.C. 3, the Secretary is authorized to "provide *in his discretion* for the destruction of

such animals * * * as *may* be detrimental to the use of any * * * parks * * *." (Emphasis supplied.) Whatever questions might arise if the Secretary sought to use this authority, without further legislation, to establish a system of federal game and fishing licenses for use in federal parks, his acts here are entirely consistent with the authority conferred. A limited number of deer are to be killed by federal officers for the purpose of determining their effect upon the ecology of the park. This purpose is plainly within both the Secretary's broad authority to conserve the parks for future generations and his specific mandate to destroy such animals as *may* be detrimental to park use. And the killing of a few deer for this limited purpose does not present the sweeping threat to state game and fishing license revenues on which petitioner and the amicus curiae premise their claims of importance.

3. Petitioner's constitutional claim—that Congress cannot, if so advised, authorize the Secretary to permit the killing of game on federal lands for any other purpose than the immediate protection of federal lands—is insubstantial. Article IV, Section 3, of the Constitution states that "The Congress shall have Power to * * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." That power is absolute. *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Alabama* v. *Texas*, 347 U.S. 272, 273–274. The Supremacy Clause of the Constitution makes clear that in case of any conflict, it is the federal, not the state, law which will prevail; the United States "may perform its functions without

conforming to the police regulations of a State." *Arizona* v. *California,* 283 U.S. 423, 451.

This reasoning has been applied by this Court in circumstances particularly apt here. In *Hunt* v. *United States,* 278 U.S. 96, state game officials challenged the authority of federal officials to kill 10,000 deer in a national forest and preserve which was immediately threatened by overbrowsing. Without having to reach the question whether the government could coopt others to assist it, as by licensing others, this Court tersely and without qualification affirmed the Secretary's authority thus to protect government land:

> * * * the power of the United States to thus protect its lands and property does not admit of doubt [citing cases], *the game laws or any other statute of the state to the contrary notwithstanding.* [*Id.,* 100; emphasis supplied.].

That holding squarely governs here, where the Secretary's purpose was to determine what protection of the government's lands required. Consequently, no substantial constitutional issue is raised.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus to convene a three-judge district court should be denied.

Respectfully submitted.

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